Filed 11/20/13 Johnson v. A-1 Recovery of Fresno CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DUSHAWN JOHNSON,

Plaintiff and Appellant,

v.

A-1 RECOVERY OF FRESNO,

Defendant and Respondent.

F064827

(Super. Ct. No. VCU239753)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Dushawn Johnson, in pro. per., for Plaintiff and Appellant.

Hardy Erich Brown & Wilson, Anders R. Morrison and Jeffrey V. Lovell for Defendant and Respondent.

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Plaintiff appeals the dismissal of his complaint, entered after the trial court denied his motion to enforce the parties' settlement agreement and found that the settlement obligations had already been performed. He contends his motion should have been granted, because defendant had not fully complied with the settlement agreement. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff sued defendants on causes of action arising out of the purchase and repossession of an allegedly defective used BMW automobile. He alleged causes of action under the Song-Beverly Consumer Warranty Act[1] and California's unfair competition law,[2] as well as invasion of privacy. He did not serve defendant, A-1 Recovery of Fresno (A-1). When plaintiff's deposition was taken by other defendants on August 12, 2011, however, A-1 appeared and participated in settlement discussions. Plaintiff agreed to accept $7,500 to settle the action; A-1 agreed to contribute $5,000 and BMW of North America, LLC agreed to contribute $2,500. In exchange, plaintiff agreed to dismiss the action and release his claims against defendants. BMW also agreed to dismiss its action against plaintiff, which sought payment for the vehicle and was consolidated with plaintiff's action. The parties executed a written settlement agreement.

After the settlement was reached, A-1 became aware that its insurer, TCS-One, had inadvertently sent two checks, totaling $3,157.41, to plaintiff in May and June 2011. Plaintiff had not notified the insurer or inquired about his receipt of the checks; he had cashed them. He stated in his declaration that the checks did not reflect any connection with this litigation and he believed them to be refunds of insurance premiums he had paid or advanced in connection with a trucking business or a restaurant he had previously operated.

In an e-mail of November 7, 2011, and a letter dated November 15, 2011, A-1's attorney explained to plaintiff's attorney that, because of a "minor computer glitch," its insurer had issued the two checks directly to plaintiff instead of to A-1's attorneys for payment of legal fees. The letter stated it was A-1's position the checks constituted

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1 Civil Code section 1790 et seq.

2 Business and Professions Code section 17200 et seq.

partial payments of the settlement amount; it enclosed a third check for the balance of $1,842.59, and stated no further checks would be forthcoming.

Plaintiff filed a motion to enforce the settlement pursuant to Code of Civil Procedure section 664.6.[3] He sought to compel A-1 to pay him an additional $3,157.41, asserting the settlement entitled him to payment of $5,000 without offset for payments made in error by the insurer. Plaintiff asserted the express waiver of claims in the settlement agreement, which included unknown claims, waived any claim for reimbursement of payments made to plaintiff in error. Alternatively, plaintiff asserted A-1's failure to perform in accordance with the settlement agreement entitled him to proceed with the action against A-1, and he asked the trial court to set the matter for trial.

A-1 opposed plaintiff's motion, arguing he was seeking a double recovery. It asserted plaintiff had already received everything he bargained for, and granting the motion would result in his unjust enrichment at A-1's expense. The trial court denied plaintiff's motion, finding the case had settled, plaintiff had received full payment from A-1, and the checks were an offset against the amount agreed on in the settlement agreement, otherwise plaintiff would be unjustly enriched. The trial court dismissed the entire action because it had settled and the settlement terms had been performed. Plaintiff appeals.

DISCUSSION

I. Appealability

A-1 asserts the order denying the motion to enforce the settlement is a nonappealable interlocutory order, but adds vaguely that the order "may be appealable on an alternate, yet uncited, basis." A-1 did not move to dismiss the appeal, but argued the merits in its respondent's brief.

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[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Nonappealable interim orders are reviewable on appeal from the final judgment. (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1292-1293.) Plaintiff's notice of appeal specified plaintiff was appealing from the judgment of dismissal, not from the order denying plaintiff's motion. No judgment of dismissal appears in the record, however. We requested the parties submit letter briefs concerning whether there was an appealable judgment in this action. Although we conclude there is no appealable judgment, there was an order of dismissal, manifesting the trial court's intention to dismiss the action. To promote the orderly administration of justice, and to avoid the useless waste of judicial and litigant time that would result from dismissing the appeal merely to have a judgment formally entered in the trial court and a new appeal filed, we order the trial court to enter a judgment of dismissal as to defendant A-1, nunc pro tunc as of the date of the dismissal order, and we will construe the notice of appeal to refer to that judgment. (*Donohue v. State of California* (1986) 178 Cal.App.3d 795, 800.)

II. Standard of Review

"A trial court, when ruling on a section 664.6 motion, acts as a trier of fact. [Citation.] Section 664.6's 'express authorization for trial courts to determine whether a settlement has occurred is an implicit authorization for the trial court to interpret the terms and conditions to settlement.' [Citation.]" (*Skulnick v. Roberts Express, Inc*. (1992) 2 Cal.App.4th 884, 889.) The trial court's factual determinations will be affirmed if the court's ruling is supported by substantial evidence. (*Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 711.) Construction or application of a statute or contract is reviewed de novo. (*Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162.)

III. Enforcement of Settlement Agreement

"Section 664.6 creates … a summary procedure for specifically enforcing certain types of settlement agreements by converting them into judgments." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 797 (*Weddington*).) It provides:

> "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (§ 664.6.)

Under section 664.6, the trial court may enforce a settlement agreement if it is valid and binding and memorialized in one of the ways set out in the statute. (*Weddington, supra*, 60 Cal.App.4th at p. 797.) A settlement agreement is not valid and binding unless the parties agreed to all the material terms of the settlement. (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182 (*Hines*).) In determining whether the parties agreed to all the material terms, the trial court may receive oral testimony or rely on declarations alone. (*Corkland v. Boscoe* (1984) 156 Cal.App.3d 989, 994.) If the requirements of section 664.6 are met, that is, if the parties reached an agreement on the material terms and the agreement was memorialized in accordance with the statute, the "trial court is authorized to resolve remaining questions of disputed fact or interpretation." (*City of Fresno v. Maroot* (1987) 189 Cal.App.3d 755, 760, fn. 3.) If the trial court determines the parties entered into an enforceable agreement, it should grant the motion and enter a formal judgment reflecting the terms of the settlement. (*Hines, supra*, at p. 1182.)

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (*Weddington, supra*, 60 Cal.App.4th at p. 810.) A contract requires mutual assent. (*Id*. at p. 811.) Mutual assent requires that the parties agree upon the same thing in the same sense. "'The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.' [Citation.]" (*Ibid*.)

> "'[M]utual consent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or

> understanding.' [Citations.] In the absence of fraud, mistake, or another vitiating factor, a signature on a written contract is an objective manifestation of assent to the terms set forth there. [Citation.] If the terms are unambiguous, there is ordinarily no occasion for additional evidence of the parties' subjective intent. [Citation.] Their 'actual intent,' for purposes of contract law, is that to which they manifested assent by executing the agreement." (*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1027, italics omitted (*Rodriguez*).)

Plaintiff's motion to enforce the settlement was based on the written settlement agreement, a copy of which was submitted with his motion. In declarations in support of the motion, plaintiff and his attorney conceded he had agreed to settle his action for $7,500, with A-1 contributing $5,000 of that amount. There was no dispute that the parties reached a settlement and executed a written agreement containing its terms. The written agreement described the pending litigation, then provided:

> "In consideration of the payment set forth in Section 2.1 and dismissal of the consolidated actions with prejudice by Johnson and BMW Bank of North America, respectively, the Parties, and each of them, hereby completely release and forever discharge each other … from any and all past, present or future claims … which either party now has or may hereafter accrue or otherwise be acquired on account of, or may in any way grow out of, or which are the subject of the consolidated actions." (Unnecessary capitalization omitted.)

> Section 2.1 of the agreement set out the payment provisions:

> "In consideration for this Agreement and dismissal of the consolidated actions with prejudice, within fifteen (15) days after the complete execution of this Agreement, settling parties agree to make payment to Johnson in the total amount of seven thousand five hundred dollars ($7,500.00) …." (Unnecessary capitalization omitted.)

The settlement agreement also required Johnson to file a dismissal of his action with prejudice within 10 days after payment of the settlement funds.

Plaintiff has not demonstrated any error in the trial court's ruling on the motion. Substantial evidence showed the parties entered into a valid and binding agreement, in

which the parties agreed to all the material terms of the settlement, and the agreement was reflected in writing as required by section 664.6.

The only dispute is about the terms of payment. Because there was no extrinsic evidence about the circumstances surrounding the negotiations for settlement or statements made by the parties or their attorneys during settlement discussions that related to this issue, interpretation of the written contract must be based on the language of the contract itself. We interpret it in accordance with the reasonable meaning of the words used, not the unexpressed intentions or understanding of either party. (*Rodriguez, supra*, 212 Cal.App.4th at p. 1027.)

In the written agreement, A-1 agreed to pay the settlement amount to plaintiff "within fifteen (15) days after the complete execution of this Agreement." Plaintiff does not dispute that, when the 15-day time period expired, he had received a full $5,000 from A-1 or its insurer. Plaintiff's complaint is not that A-1 failed to pay, but that it paid too early. He contends payment "*after* the complete execution of this Agreement" was a material term of the agreement with which A-1 did not comply. The language of the agreement does not indicate the parties intended to absolutely prohibit early payment or to make an inadvertent early payment a breach of the contract. A reasonable interpretation of the time provision is that it was intended to require prompt payment; it served to set an outside time limit on payment to prevent unwarranted delay. There is no dispute that plaintiff received the full $5,000 amount from A-1 or its insurer prior to that outside time limit. Plaintiff admitted he received the first two checks, totaling $3157.41, and cashed them; he did not dispute that he was issued a third check for the balance of $1,842.59.

The trial court implicitly found, and we agree, that payment *after* execution of the settlement agreement was not a material term of that agreement. There is no evidence the parties discussed that provision, or plaintiff required it to be included in the agreement.

The payment amount was a material term; the time provision ensured payment without undue delay. The evidence presented to the trial court demonstrated A-1 or its insurer remitted the full $5,000 to plaintiff prior to the date plaintiff filed his motion to enforce the settlement agreement. Substantial evidence supported the trial court's finding that A-1 had already performed its obligations, and the case was ready to be dismissed pursuant to the terms of the agreement.

A motion to enforce a settlement agreement is an equitable remedy in the nature of specific performance. (*Gregory v. Hamilton* (1978) 77 Cal.App.3d 213, 219.) "Equity is not bound by rigid precedent, but has the flexibility to adjust the remedy in order to do right and justice." (*Hutton v. Gliksberg* (1982) 128 Cal.App.3d 240, 249.) It is undisputed plaintiff received the full amount he agreed to accept from A-1 in settlement of his claims against it. Plaintiff does not dispute A-1's assertion that the May and June 2011 checks were sent to plaintiff by mistake. Plaintiff does not argue that he had any claim or entitlement to those payments at the time they were made. At the time the parties reached their settlement agreement, A-1 was not aware of the mistaken payments; plaintiff was not aware the payments came from A-1's insurer and were not intended for him, but he failed to inquire into their source or purpose. Neither party took those payments into consideration in negotiating the settlement. Under these circumstances, it would have been inequitable to enforce the settlement as if those payments had not been made, as plaintiff requested. Plaintiff would have been unjustly enriched at A-1's expense.[4] For this reason also the court did not err in finding that A-1 fully performed its obligations under the settlement agreement.

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[4] A person is unjustly enriched if he receives a benefit at another's expense. (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51.) A person who is unjustly enriched may be required to make restitution to the other if the circumstances of receipt or retention of the benefit are such that, as between the two persons, it is unjust for him to retain it. (*Ibid*.)

IV. Plaintiff's Arguments

A. Offset

Plaintiff contends the trial court erred in using the first two checks to plaintiff as an offset against the settlement amount. He asserts offset is new matter constituting an affirmative defense that must be pled in the answer. (Code Civ. Proc., § 431.30, subd. (b)(2).) Plaintiff argues A-1 did not plead it in an answer, and the trial court could not give effect to a defense that was not pled. Plaintiff's argument lacks merit.

A-1 did not raise the earlier payments as a defense to the substantive allegations against it in plaintiff's second amended complaint, which concerned repossession of an automobile. A-1 was never served with any complaint in this action, and was therefore not called upon to plead in response to it. A-1 raised the issue of the prior mistaken payments in opposition to plaintiff's motion to enforce the settlement agreement. It was a response to plaintiff's claim that A-1 failed to comply with the payment requirements of the settlement agreement. A-1 presented evidence that it had already fully performed under the settlement agreement by making payments to plaintiff totaling the amount it was obligated to pay. Thus, the offset issue was not a matter to be pled as an affirmative defense to the allegations of the second amended complaint. The prior payments were evidence presented in opposition to plaintiff's motion to enforce the settlement agreement, to demonstrate that the motion should not be granted.

B. Modification of the agreement

Plaintiff asserts that a trial court ruling on a motion to enforce a settlement agreement cannot create terms to which the parties did not agree. (*Weddington, supra*, 60 Cal.App.4th at p. 797.) He claims the trial court created a term allowing an offset although the parties did not include it in the agreement.

In *Weddington*, the parties reached agreement on some material terms, but could not agree on others. The private judge, in attempting to enforce a settlement, created

additional terms he deemed consistent with those to which the parties had agreed. The court reversed the judgment, which was based on the purported settlement agreement, finding "there was no writing signed by the parties containing the material terms, which the private judge placed into his order and which later appeared in the judgment." (*Weddington, supra,* 60 Cal.App.4th at p. 797.)

Here, the trial court did not create terms to which the parties had not agreed; as discussed previously, it interpreted the terms of the writing the parties created and signed. The written agreement provided that plaintiff would dismiss his action and release his claims against A-1 and the other defendants in exchange for "the payment set forth in Section 2.1." Section 2.1 required payment of $7,500 by defendants. Plaintiff does not dispute that he was paid that amount in full. The trial court did not create or modify terms of the agreement.

C. Past consideration

Plaintiff asserts the checks he received in May and June 2011 were past consideration, which was not adequate consideration for a new promise. In support of his argument, he relies on *Passante v. McWilliam* (1997) 53 Cal.App.4th 1240. In *Passante*, the plaintiff, an attorney for a corporation, arranged for a loan to be made to the corporation at a time when the corporation's future would have been in jeopardy without the loan. In gratitude, the directors offered him a 3 percent interest in the corporation. (*Id*. at p. 1244.) The shareholders subsequently redistributed the shares of the company, and informed the plaintiff that he would not get his 3 percent. Although the jury found in the plaintiff's favor, the trial court granted a judgment notwithstanding the verdict on the plaintiff's breach of contract cause of action. The appellate court affirmed, concluding "[c]onsideration must … be given in exchange for the promise," and "[p]ast consideration cannot support a contract." (*Id*. at p. 1247.) The plaintiff's breach of contract claim "founder[ed] on the rule that consideration must result from a bargain."

(*Ibid*.) The plaintiff had already arranged the loan before the directors discussed giving him an interest in the company. There was no evidence he expected to be given stock in exchange for arranging the loan. "'[I]f there was no expectation of payment by either party when the services were rendered, the promise is a mere promise to make a gift and not enforceable.' [Citation.]" (*Id*. at pp. 1248-1249.)

A-1 did not render services or payment to plaintiff gratuitously, then later seek to use the services or payment as consideration for promises of plaintiff. The checks were sent to plaintiff mistakenly; there was no intent to make payments to him, gratuitously or otherwise. "'Any benefit conferred … upon the promisor, by any other person, to which the promisor is not lawfully entitled … is a good consideration for a promise.'" (*Desny v. Wilder* (1956) 46 Cal.2d 715, 737.) The benefit plaintiff bargained for and received from A-1 was $5,000. Plaintiff was not legally entitled to any part of the $5,000 before the parties bargained and agreed that it would be paid. The May and June 2011 checks were not past consideration, to which plaintiff was already entitled. Consequently, the payments were legally adequate consideration for the promises contained in the settlement agreement.

D. Civil Code section 1542 waiver

Section 1542 of the Civil Code provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." In the settlement agreement, the parties expressly waived their rights under this section. Plaintiff contends A-1's waiver of rights under Civil Code section 1542 released any claim it had to the $3,157.41 paid to plaintiff in May and June 2011, even though A-1 was unaware of the payments at the time it entered into the settlement agreement. Consequently, plaintiff asserts, A-1 was required to pay plaintiff the full $5,000 without deduction for the $3,157.41 already paid.

In their settlement agreement, the parties released each other from any claims "which are the subject of the consolidated actions," or "may in any way grow out of" them. (Capitalization omitted.) The parties acknowledged the release is a general release, and "[t]he Parties, and each of them, expressly waive and assume the risk of any and all claims for damages which exist as of this date, but of which the Parties do not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which if known, would materially affect the Parties' decision to enter into this Agreement."

The claim for reimbursement for the checks that were mistakenly sent to plaintiff belonged to A-1's insurer, TCS-One, which was not a party to the actions or the settlement agreement. The claim arose out of TCS-One's computer glitch, which caused the checks it intended to send to A-1's attorneys in payment of their fees to be sent to plaintiff instead. TCS-One's claim for restitution for the mistaken payments was not a claim for damages. It was not the subject of either of the consolidated actions, nor did it grow out of the claims made in those actions, which involved warranty repairs to a BMW automobile, failure to pay the purchase price for it, and the repossession of the automobile. TCS-One's claim grew out of its error in sending checks to plaintiff instead of to A-1's attorneys, an event completely separate from the transactions involving the automobile. Thus, the claim was not the type of preexisting claim released by the settlement agreement.

E. Leave to amend

Plaintiff contends the trial court should have granted him leave to amend his complaint to allege a new cause of action for fraud, based on allegations A-1 knew of the mistaken payments, but concealed them in order to induce plaintiff to agree to the settlement. We note there was no noticed motion for leave to amend the complaint pursuant to section 473 filed in the trial court. (§ 473; Cal. Rules of Court, rule 3.1324;

Hall v. Department of Adoptions (1975) 47 Cal.App.3d 898, 904.) Such a motion would have been futile in any event. The parties had settled the actions, defendants had performed in conformance with the settlement agreement, and plaintiff was obligated by the agreement to dismiss his action. Once the action was dismissed, there was, of course, no pending action in which the complaint could be amended. The trial court did not err by declining to grant leave to amend.

DISPOSITION

The trial court is directed to enter a judgment of dismissal nunc pro tunc as of the date of the dismissal order. The judgment is affirmed. Respondent is entitled to its costs on appeal.

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HILL, P. J.

WE CONCUR:

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CORNELL, J.

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PEÑA, J.